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Novaviro Technology Sdn Bhd v QL Plantation Sdn Bhd & Anor (Watermech Engineering Sdn Bhd, third party)

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22IP-51–12 OF 2016
WONG KIAN KHEONG JC
6 NOVEMBER 2017

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Civil Procedure — Striking out — Action — Application to strike out suit — Contents of statement of claim — Whether scandalous within meaning of O 18 r 19(1)(b) of the Rules of Court 2012 — Whether suit barred by issue estoppel principle — Whether suit time-barred — Whether action frivolous, vexatious and an abuse of court process — Whether obviously unsustainable — Rules of Court 2012 O 92 r 4

D

Limitation — Cause of action — Tort of breach of confidence — Accrual of — Tort of breach of confidence accrued on date when party used confidential information — Whether elements satisfied — Whether six year limitation period expired — Whether action time barred — Limitation Act 1953 s 6(1)(a)

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The plaintiff, an exclusive licensee of a system developed by Keck Seng (M) Bhd known as a 'Continuous Flow Stirred Tank Reactor Anaerobic Digester System' ('CSTR system'), applied to recover methane from treatment of palm oil mill effluents. The plaintiff entered into a joint venture arrangement with a third party company ('third party') and shared confidential information regarding the CSTR system ('confidential information'). The JV, however, was subsequently terminated. When the defendants wished to build a biogas power plant at the mill which would utilise POME to generate power ('plant'), the plaintiff submitted a proposal to the first defendant to design, build and commission the plant based on the CSTR system. The defendant also received a proposal from the third party regarding the plant ('third party's proposal'). Subsequently, the defendants informed the plaintiff that the defendants had accepted the third party's proposal which was a lower bid than the plaintiff's proposal. The plaintiff, by a letter ('the plaintiff's legal demand') notified the defendants that the third party had used confidential information in respect of the construction of the plant and this had infringed the plaintiff's rights and requested that the defendants provide an undertaking to cease construction of the plant which had used the confidential information. The defendants rejected the plaintiff's request to cease construction. The plaintiff commenced the first suit ('the first suit') based on, among others, the tort of breach of confidence by the third party when the third party's system was installed in the

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plant by use of the confidential information after the termination of the JV. After a trial, judgment was delivered by the High Court in favour of the plaintiff. The third party's appeal to the Court of Appeal and Federal Court was also dismissed. The plaintiff demanded for payment of RM1.5m from the defendants for breach of confidence in respect of the confidential information. The defendants replied that they were not parties to the first suit and had no knowledge of it and that the third party had assured the defendants that the third party had never copied or used confidential information in the construction of the plant. The plaintiff claimed that the defendants had enjoyed the benefit of the third party's breach since the commissioning of the plant in June 2011 and that the defendants were unjustly enriched by their wrongful use of the confidential information when the plant was operational. Via encl 5, the defendants applied to strike out the plaintiff's action pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 ('the ROC'). In encl 20, the third party applied to strike out this action. The issues that arose were: (a) whether the contents of the plaintiff's statement of claim ('SOC') were scandalous within the meaning of O 18 r 19(1)(b) of the ROC; (b) whether the plaintiff was estopped from filing this suit because the plaintiff had filed an earlier suit ('the first suit') and had obtained judgment against the third party; (c) whether this suit was barred by an application of the issue estoppel principle; (d) whether the plaintiff's claim for tort of breach of confidence was time barred under s 6(1)(a) of the Limitation Act 1953 ('the LA'); (e) whether the plaintiff's claim for unjust enrichment was barred by limitation under s 6(6) of the LA; and (f) whether the third party could apply to strike out this action pursuant to O 16 rr 4(3), (4), 6, O 18 r 19(1) and O 92 r 4 of the ROC and/or the court's inherent jurisdiction.

Held, allowing encl 5 with costs; dismissing encl 20 with costs:

(1) The plaintiff's statement of claim disclosed two causes of action against the defendants, namely, the tort of breach of confidence and unjust enrichment. This court assumed that the contents of the SOC regarding the two causes of action were true and were not 'wholly unnecessary or irrelevant' and were therefore not scandalous. As such, there was no basis for this court to exercise its discretion to strike out the plaintiff's SOC. The defendants could not strike out this action pursuant to O 18 r 19(1)(c) because there was no evidence that a fair trial of this case would be prejudiced, embarrassed or delayed (see paras 27–29).

(2) The issue of tort of breach of confidence regarding the confidential information that was raised in this action was the same question which had been decided in the first suit. This case also concerned the same material facts regarding the confidential information as in the first suit. The plaintiff had obtained the judgment which provided for, among others, an inquiry of damages (to be paid by the third party to the plaintiff) and an account of profits (to be paid by the third party and one

Goh to the plaintiff). There was no evidence that the third party and Goh were insolvent and could not satisfy the judgment. There was no prejudice to the plaintiff because the plaintiff had the right to enforce the judgment against the third party and Goh. There was a privity of commercial interest between the third party and the defendants. The plaintiff had no monetary benefit in pursuing this suit against the defendants. The plaintiff was thus barred by the issue estoppel principle from commencing this action against the defendants (see para 43).

(3) A cause of action for the tort of breach of confidence accrues on a date when the three elements (tort of breach of confidence) are satisfied ie: (a) the information in question must have the necessary quality of confidence; (b) the information must have been imparted in circumstances importing an obligation of confidence; and (c) there must be an unauthorised use of the confidential information to the detriment of the party communicating it. The three said elements were satisfied on 30 April 2010 when the defendants used the confidential information by examining, making, retaining and providing copies of drawings of the third party's proposal to other parties. As such, the six year limitation period for the plaintiff's cause of action for the tort of breach of confidence would have expired on 1 May 2016. When this suit was filed on 27 December 2016, the plaintiff's cause of action for the tort of breach of confidence was time-barred under s 6(1)(a) of the LA (see paras 48 & 51).

(4) The defendants had retained the benefit of the confidential information on 30 April 2010 (when the defendants had first used the confidential information in the construction of the plant). Limitation period for the plaintiff's cause of action for unjust enrichment accrued, therefore, on 30 April 2010 and would be time barred on 1 May 2016. Consequently, this suit based on a claim for unjust enrichment (filed on 27 December 2016) was time barred under s 6(6) of the LA. As this suit was barred by the issue estoppel principle, and considering the defence of limitation in this case, this action was frivolous and/or vexatious and constituted an abuse of court process under O 92 r 4 of the ROC and/or the court's inherent jurisdiction. This action ought to be struck out on the ground that it was obviously unsustainable (see para 62).

(5) Order 16 r 6 and O 18 r 19(1) of the ROC do not allow a third party to apply to court to strike out an action by a plaintiff or a defendant's counterclaim and neither does it either expressly or by necessary implication permit a third party to apply to court to strike out a suit or a counterclaim. The striking out of a suit or a counterclaim is a draconian measure which would deprive a plaintiff or a defendant of his or her fundamental right under art 5(1) of the Federal Constitution to have

A access to justice. A plaintiff may not have any dispute with a third party which can justify an application by a third party to strike out an action (see para 66).

[Bahasa Malaysia summary

B Plaintif, pemegang lesen eksklusif sebuah sistem yang dibangunkan oleh Keck Seng (M) Bhd yang dikenali sebagai Continuous Flow Stirred Tank Reactor Anaerobic Digester System ('Sistem CSTR') memohon untuk mendapatkan semula metana dari kilang rawatan minyak kelapa sawit. Plaintif memeterai perjanjian usaha sama dengan syarikat pihak ketiga ('pihak ketiga') dan
C berkongsi maklumat sulit tentang Sistem CSTR ('maklumat rahsia'). Walau bagaimanapun, JV ditamatkan. Apabila defendan-defendan ingin membina kilang kuasa biogas di loji yang akan menggunakan POME untuk menjana kuasa ('loji'), plaintif mengemukakan cadangan kepada defendan pertama untuk mereka bentuk, membina dan mengkomisen loji ini berdasarkan Sistem
D CSTR. Defendan-defendan juga menerima cadangan daripada pihak ketiga tentang loji ini ('cadangan pihak ketiga'). Seterusnya, defendan-defendan memberitahu pihak plaintif bahawa defendan-defendan telah menerima cadangan pihak ketiga yang merupakan tawaran yang lebih rendah daripada cadangan plaintif. Plaintif, melalui sepucuk surat ('tuntutan undang-undang
E plaintif') memberitahu defendan-defendan bahawa pihak ketiga telah menggunakan maklumat sulit berkenaan dengan pembinaan loji itu dan ini melanggar hak plaintif dan meminta supaya defendan-defendan menyediakan suatu langkah untuk menghentikan pembinaan loji yang telah menggunakan maklumat sulit tersebut. defendan-defendan menolak permintaan plaintif
F untuk menghentikan pembinaan. Plaintif memulakan saman pertama ('saman pertama') berdasarkan, antara lain, tort pemecahan kerahsiaan oleh pihak ketiga apabila sistem pihak ketiga dipasang di loji dengan menggunakan maklumat sulit selepas penamatan JV. Selepas perbicaraan, penghakiman Mahkamah Tinggi memihak kepada plaintif. Rayuan pihak ketiga ke
G Mahkamah Rayuan dan Mahkamah Persekutuan juga ditolak. Plaintif menuntut pembayaran sebanyak RM1.5m daripada defendan-defendan kerana memecah kerahsiaan tentang maklumat sulit. Defendan-defendan membalas bahawa mereka bukan pihak dalam saman pertama dan tidak tahu tentang ini dan pihak ketiga telah meyakinkan defendan-defendan bahawa
H pihak ketiga tidak pernah menyalin atau menggunakan maklumat sulit dalam pembangunan loji tersebut. Plaintif mendakwa bahawa defendan-defendan telah menikmati manfaat pelanggaran pihak ketiga sejak pengkomisenan loji tersebut pada Jun 2011 dan bahawa defendan-defendan telah diperkaya secara tidak adil dengan menggunakan maklumat sulit mereka apabila loji tersebut
I beroperasi. Melalui lampiran 5, defendan-defendan memohon untuk membatalkan tindakan plaintif menurut A 18 k 19(1)(a), (b), (c) dan (d) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Dalam lampiran 20, pihak ketiga memohon untuk membatalkan tindakan ini. Isu-isu yang timbul adalah: (a) sama ada kandungan penyata tuntutan plaintif ('SOC') adalah skandal

dalam maksud A 18 k 19(1)(b) KKM; (b) sama ada plaintif diestop daripada memfailkan saman ini kerana plaintif telah memfailkan saman awal ('saman pertama') dan telah memperoleh penghakiman terhadap pihak ketiga; (c) sama ada saman ini dihalang oleh pemakaian prinsip estopel isu; (d) sama ada tuntutan plaintif bagi tort pemecahan kerahsiaan dihadkan oleh masa bawah s 6(1)(a) Akta Had Masa 1953 ('AHM'); (e) sama ada tuntutan plaintif untuk pengkayaan tidak adil dihalang oleh had masa bawah s 6(6) AHM; dan (f) sama ada pihak ketiga boleh memohon untuk mengetepikan tindakan ini menurut A 16 k 4(3), (4), 6, A 18 k 19(1) dan A 92 k 4 KKM dan/atau bidang kuasa mahkamah.

Diputuskan, membenarkan lampiran 5 dengan kos; menolak lampiran 20 dengan kos:

(1) Pernyataan tuntutan plaintif mendedahkan dua kausa tindakan terhadap defendan-defendan, iaitu, tort memecah kerahsiaan dan pengkayaan tidak patut. Mahkamah ini menganggap bahawa kandungan SOC berhubung dua kausa tindakan tersebut adalah benar dan tidak 'tidak perlu atau tidak relevan' dan oleh itu tidak bersifat skandal. Oleh itu, tidak ada asas bagi mahkamah ini untuk menjalankan budi bicaranya untuk membatalkan SOC plaintif. defendan-defendan tidak boleh membatalkan tindakan ini bawah A 18 k 19(1)(c) kerana tidak ada keterangan bahawa perbicaraan adil dalam kes ini akan terprejudis, memalukan atau terlewat (lihat perenggan 27–29).

(2) Isu tort memecah kerahsiaan tentang maklumat sulit yang dibangkitkan dalam tindakan ini adalah persoalan yang sama yang telah diputuskan dalam guaman pertama. Kes ini juga mengambil kira fakta material yang sama tentang maklumat sulit seperti dalam guaman pertama. Plaintif telah memperoleh penghakiman memperuntukkan, antara lain, inkuiri ganti rugi (dibayar oleh pihak ketiga kepada plaintif) dan akaun keuntungan (yang akan dibayar oleh pihak ketiga dan seorang bernama Goh kepada plaintif). Tidak ada keterangan bahawa pihak ketiga dan Goh tidak solven dan tidak dapat memenuhi balasan. Tidak ada prejudis kepada plaintif kerana plaintif mempunyai hak untuk menguatkuasakan penghakiman terhadap pihak ketiga dan Goh. Terdapat kepentingan komersil antara pihak ketiga dan defendan-defendan. Plaintif tidak mempunyai faedah kewangan dalam meneruskan saman ini terhadap defendan-defendan. Oleh itu, plaintif terhalang oleh prinsip estoppel isu dari memulakan tindakan ini terhadap defendan-defendan (lihat perenggan 43).

(3) Suatu kausa tindakan tort memecah kerahsiaan terakru pada tarikh apabila tiga unsur (tort pemecahan kerahsiaan) dipenuhi iaitu: (a) maklumat yang bersangkutan mesti mempunyai kerahsiaan yang dikehendaki; (b) maklumat mestilah disampaikan dalam keadaan yang

mengimport kewajipan kerahsiaan; dan (c) mesti ada maklumat sulit yang tidak dibenarkan untuk menjejaskan pihak mengkomunikasikannya. Ketiga-tiga elemen ini dipenuhi pada 30 April 2010 apabila defendan-defendan menggunakan maklumat sulit dengan memeriksa, membuat, mengekalkan dan menyediakan salinan lukisan cadangan pihak ketiga kepada pihak lain. Justeru, tempoh had enam tahun bagi tindakan tindakan plaintif untuk tort pemecahan kerahsiaan akan tamat pada 1 Mei 2016. Apabila saman ini difailkan pada 27 Disember 2016, tindakan plaintif untuk tort memecah rahsia dilarang masa bawah s 6(1)(a) AHM (lihat perenggan 48 & 51).

(4) Defendan-defendan telah mengekalkan manfaat maklumat rahsia pada 30 April 2010 (ketika defendan-defendan menggunakan maklumat rahsia dalam pembangunan loji tersebut). Oleh itu, tempoh had masa untuk kausa tindakan plaintif untuk pengkayaan tidak adil terakru pada 30 April 2010 dan akan dihalang had masa pada 1 Mei 2016. Oleh itu, tuntutan ini berdasarkan tuntutan untuk pengkayaan tidak adil (difailkan pada 27 Disember 2016) telah dihalang masa di bawah s 6(6) AHM. Memandangkan saman ini dihalang oleh prinsip estoppel isu, dan mempertimbangkan pembelaan had masa dalam kes ini, tindakan ini adalah remeh dan/atau menyusahkan dan merupakan penyalahgunaan proses mahkamah bawah A 92 k 4 KKM dan/atau bidang kuasa inheren mahkamah. Tindakan ini sepatutnya dibatalkan atas alasan bahawa ia tidak dapat dikekalkan (lihat perenggan 62).

(5) Perintah A 16 k 6 dan A 18 k 19(1) KKM tidak membenarkan pihak ketiga memohon kepada mahkamah untuk membatalkan tindakan oleh plaintif atau tuntutan balas defendan-defendan dan sama ada secara nyata atau implikasi perlu, membenarkan pihak ketiga yang memohon kepada mahkamah agar membatalkan saman atau tuntutan balas. Pembatalan saman atau tuntutan balas adalah langkah yang keras yang akan menafikan plaintif atau defendan-defendan hak asasinya bawah perkara 5(1) Perlembagaan Persekutuan untuk mendapatkan keadilan. Seorang plaintif mungkin tidak mempunyai sebarang pertikaian dengan pihak ketiga yang boleh mewajarkan permohonan oleh pihak ketiga untuk membatalkan tindakan (lihat perenggan 66).]

Notes

For a case on tort in general, see 9 *Mallal's Digest* (5th Ed, 2015) para 2638. For cases on action for striking out, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9211–9269.

Cases referred to

Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2000] 2 MLJ 417, CA (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)
China and South Sea Bank Ltd v Tan [1989] 3 All ER 839, PC (refd)
Coco v AN Clark (Engineers) Ltd [1969] RPC 41, HC (refd)
Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409, SC (folld)
Diamandis v Wills and another [2015] EWHC 312, Ch D (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Dynacast (Melaka) Sdn Bhd & Ors v Vision Cast Sdn Bhd & Anor [2016] 3 MLJ 417; [2016] 6 CLJ 176, FC (refd)
Fuller v Harry Shopper Markets Ltd & Anor [2001] 1 WLR 1681, Ch D (refd)
Gleeson v J Wippell & Co Ltd [1977] 1 WLR 510, Ch D (refd)
Government of India v Petrocon India Ltd [2016] 3 MLJ 435, FC (refd)
Iradar Sdn Bhd v Nutech Company Limited & Anor [2016] MLJU 1248; [2017] 1 MLRH 15, HC (refd)
MMIP Services Sdn Bhd (as administrator of Malaysian Motor Insurance Pool) v Overseas Assurance Corp (M) Bhd (the successor in title to the general insurance business of Tahan Insurance (M) Bhd pursuant to vesting order dated 15 October 2010) (IUB Greengold Bhd, third party (formerly known as Tahan Insurance Malaysia Bhd)) [2016] 10 MLJ 452; [2016] 3 AMR 143, HC (refd)
Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara Maju Bhd [1997] 1 MLJ 557, CA (refd)
Nik Che Kok @ Nik Soo Kok v Public Bank Bhd [2001] 2 MLJ 328, CA (folld)
See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235, CA (refd)
Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118, PC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia [2010] 2 MLJ 333; [2010] 3 CLJ 507, FC (refd)
Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494; [1986] CLJ (Rep) 256, SC (refd)
Tasja Sdn Bhd v Golden Approach Sdn Bhd [2011] MLJU 067; [2011] 3 CLJ 751, FC (refd)
Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet [2007] 1 MLJ 163; [2006] 7 CLJ 541, HC (refd)
Tekital Sdn Bhd v Sarina bt Kamaludin & Ors [2012] 8 MLJ 734, HC (refd)
Tenaga Nasional Bhd v Kamarstone Sdn Bhd [2014] 2 MLJ 749, FC (folld)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd & other appeals [1996] 1 MLJ 661, CA (refd)
United Logistics Sdn Bhd v Stamford College (PJ) Sdn Bhd [2016] MLJU 392; [2016] MRLHU 782, HC (refd)
Wawasan Dengkil Properties Sdn Bhd & Ors v Khoo Peng Lai & Ors [2016] 6 MLJ 330, CA (refd)

Legislation referred to

Companies Act 1965 s 181
Contracts Act 1950 s 71
Federal Constitution art 5(1)
Limitation Act 1953 ss 4, 6, 6(1), (1)(a), (6), 22, 32
Limitation Act 1980 [UK] s 6(6)
Rules of Court 2012 O 16 rr 4, 4(3), (4), (5), 6, O 18 r 19(1), (1)(a), (1)(b), (1)(c), (1)(d), (2), O 92 r 4

Gerald Samuel (Gregory Ling Lee Yi and Villasini a/p Nethiganantarajah with him) (Ranjit Singh & Yeoh) for the plaintiff.
Alan Wong (Cliff Siow with him) (Zain Megat & Murad) for the defendant.
Yap Yoon Jan (GideonTan Razali Zaini) for the third party.

Wong Kian Kheong JC:

A. ISSUES

[1] In this case, two defendant companies ('the defendants') apply in court encl No 5 ('encl 5') to strike out the suit filed by the plaintiff company ('the plaintiff'). In court encl No 20, the third party company ('the third party') apply to strike out this action ('encl 20').

[2] Enclosures 5 and 20 raise the following questions:

(a) whether a suit can be struck out on any one or more of the following gounds —

(i) the contents of a statement of claim ('SOC') are scandalous within the meaning of O 18 r 19(1)(b) (para (b)) of the Rules of Court 2012 ('the RC');

(ii) the plaintiff is estopped from filing this suit because, among others, the plaintiff has filed an earlier suit (Kuala Lumpur High Court Civil Suit No 22(IP)-47 of 2011 against, among others, the third party ('first suit')) and has obtained judgment against, among others, the third party after a trial ('judgment');

(iii) this suit is barred by an application of the issue estoppel principle, the second limb of res judicata doctrine;

(iv) the plaintiff's claim for tort of breach of confidence is time-barred under s 6(1)(a) of the Limitation Act 1953 ('the LA'); and

(v) the plaintiff's claim for unjust enrichment is barred by limitation under s 6(6) of the LA; and

(b) whether the third party can apply to strike out this action pursuant to

O 16 rr 4(3), (4), 6, O 18 r 19(1), O 92 r 4 of the RC and/or the court's inherent jurisdiction. A

B. BACKGROUND

[3] The plaintiff is an exclusive licensee of a system developed by Keck Seng (M) Bhd and known as a 'continuous flow stirred tank reactor anaerobic digester system' ('CSTR system'). The CSTR system is applied to recover methane from treatment of palm oil mill effluents ('POME'). B

[4] The second defendant company ('the second defendant') is a public listed company which wholly owns QL Oil Sdn Bhd ('QLO'). QLO wholly owns the first defendant company ('the first defendant'). The first defendant runs a palm oil processing mill at Tawau, Sabah ('the Mill'). C

[5] The plaintiff entered into a joint venture arrangement with the third party ('JV'). By way of the JV, the plaintiff shared confidential information regarding the CSTR system (confidential information). The JV was terminated on or about 10 March 2009. D

[6] The defendants wished to build a biogas power plant at the Mill which would utilise POME to generate power ('the plant'). E

[7] On or about 18 March 2010, the plaintiff submitted a proposal to the first defendant to design, build and commission the plant based on the CSTR system ('the plaintiff's proposal'). Subsequently, the plaintiff was appointed by the defendants to be a consultant to apply to the Department of Environment of Sabah ('DOE') to obtain DOE's approval to upgrade the capacity of the Mill to contain a POME treatment system. F G

[8] The first defendant received a proposal from the third party regarding the plant ('third party's proposal') on 20 March 2010.

[9] On 30 April 2010, the defendants informed the plaintiff that the defendants had accepted the third party's proposal (which was a lower bid than the plaintiff's proposal). H

[10] By an email dated 3 May 2010, the plaintiff informed the second defendant that, among others, any unauthorised use of confidential information would be an infringement of the plaintiff's rights. The defendants replied by an email dated 11 May 2010 which stated, among others: I

(a) the defendants respect intellectual property ('IP') rights; and

A (b) the defendants would not engage a contractor who deliberately infringes rights of a third party.

The plaintiff did not reply to this email by the defendants.

B **[11]** The second defendant obtained an indemnity dated 14 June 2010 from the third party whereby the third party agreed to indemnify the second defendant against any infringement of IP right with regard to the third party's system ('third party's system') which would be installed at the plant ('first indemnity').

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[12] By a letter dated 19 October 2010 from the plaintiff's solicitors to the defendants ('the plaintiff's legal demand'), among others:

(a) the plaintiff's solicitors notified the defendants that the third party had used confidential information in respect of the construction of the plant and this had infringed the plaintiff's rights; and

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(b) the defendants were requested to provide an undertaking to cease construction of the plant which had used the confidential information.

E **[13]** By a letter dated 28 October 2010, the third party confirmed to the second defendant that the third party had employed its own technology in installing the third party's system in the plant and did not use confidential information.

F **[14]** In a letter dated 1 November 2010, the defendants' previous solicitors, among others, rejected the request by the plaintiff's solicitors to cease construction of the plant. The plaintiff's solicitors did not respond to this letter from the defendants' previous solicitors.

G **[15]** The plaintiff commenced the first suit based on, among others, the tort of breach of confidence by the third party when the third party's system was installed in the plant by use of confidential information after the termination of the JV.

H **[16]** The first suit was commenced by the plaintiff against the third party and Mr Goh Eng Huat (the alter ego of the third party) ('Mr Goh'). In the first suit:

(a) after a trial, judgment was delivered by the High Court in favour of the plaintiff against the third party and Mr Goh;

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(b) the third party's appeal to the Court of Appeal against the judgment had been dismissed (Court of Appeal's decision); and

(c) the Federal Court did not grant leave to the third party to appeal to the Federal Court against the Court of Appeal's decision.

[17] In two letters dated 5 May 2016 and 9 May 2016, the plaintiff's solicitors demanded for payment of RM1.5m from the defendants for breach of confidence in respect of the confidential information.

[18] The third party sent a letter dated 12 May 2017 to the defendants which, among others, undertook to indemnify the defendants on a 'full indemnity basis' for any loss and legal costs which might be suffered by the defendants in any action to be brought by the plaintiff ('second indemnity').

[19] The construction of the plant based on the third party's system commenced in June 2010.

[20] In reply to the plaintiff's two letters dated 5 May 2016 and 9 May 2016, the first defendant wrote a letter dated 13 May 2016 which stated, among others, as follows:

(a) the defendants were not parties to the first suit and had no knowledge of it;

(b) the third party had 'represented/assured' to the defendants that the third party had never copied or used confidential information in the construction of the plant; and

(c) the defendants requested for documents to prove that confidential information had been used in the construction of the plant.

[21] The plant was commissioned on 19 August 2011 — please see 'GenSet Handing — over Certificate'.

[22] By a letter dated 28 November 2016, the plaintiff's solicitors, among others:

(a) enclosed certain documents obtained in the first suit which showed that the third party had utilised confidential information in the construction of the plant;

(b) referred to certain parts of the judgment which held that the plant had essential features of CSTR system and the third party had breached its duty of confidentiality owed to the plaintiff (third party's breach); and

(c) the defendants had enjoyed the benefit of the third party's breach since the commissioning of the plant in June 2011.

[23] The plaintiff pleaded, among others, as follows in the SOC:

(a) the defendants have received confidential information and owe a duty of confidentiality to the plaintiff;

(b) the defendants breached their duty of confidentiality to the plaintiff when confidential information was used to build the plant which was commissioned on or about July 2011; and

(c) additionally or alternatively, the defendants were unjustly enriched by their wrongful use of the confidential information when the plant was operational on or about July 2011.

C. ENCLOSURE 5

[24] In encl 5, the defendants applied to strike out this action pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the RC as well as the court's inherent jurisdiction. Enclosure 5 is based on the following three grounds:

(a) the plaintiff is estopped from filing this suit because the plaintiff has filed the first suit and obtained judgment;

(b) this suit is barred by the issue estoppel principle; and

(c) this action is barred by limitation.

[25] To decide encl 5 under O 18 r 19(1)(a) of the RC (para (a)):

(a) according to O 18 r 19(2) of the RC, the court cannot consider affidavit evidence — please see the Court of Appeal's judgment delivered by Ramly Ali JCA (as he then was) in *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235, at paras 9–10; and

(b) the court will assume that the contents of the SOC are true — please see the Court of Appeal's judgment given by Mahadev Shankar JCA in *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd & other appeals* [1996] 1 MLJ 661 at p 679.

[26] It is not disputed that the court may consider affidavits filed by both the plaintiff and defendants in deciding encl 5 pursuant to O 18 r 19(1)(b), (c), (d) and the court's inherent jurisdiction (which is also provided in O 92 r 4 of the RC).

D. CAN THIS SUIT BE STRUCK OUT UNDER PARA (a)?

[27] The plaintiff's SOC discloses two causes of action against the defendants, namely the tort of breach of confidence and unjust enrichment (two causes of action). For the purpose of para (a), the court will assume that the contents of the plaintiff's SOC regarding the two causes of action are true — *Tuan Haji Ishak bin Ismail*. In the circumstances, encl 5 cannot succeed under para (a).

E. WHETHER COURT SHOULD STRIKE OUT THIS SUIT ON THE GROUNDS THAT SOC IS SCANDALOUS OR A FAIR TRIAL IS PREJUDICED, EMBARRASSED OR DELAYED

[28] The use of the permissive term 'may' in O 18 r 19(1) of the RC means that the court has a discretionary power to strike out a suit under any one or more of the paragraphs in O 18 r 19(1)(a)–(d)of the RC.

[29] I am of the view that the contents of the SOC in this action are not 'wholly unnecessary or irrelevant' and are therefore not scandalous under para (b) — please see Low Hop Bing J's (as he then was) judgment in the High Court case *Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet* [2007] 1 MLJ 163; [2006] 7 CLJ 541, at para 28. As such, there is no basis for this court to exercise its discretion to strike the plaintiff's SOC under para (b).

[30] Even if it is assumed that the contents of the plaintiff's SOC are scandalous, this court will not exercise its discretion to strike out this suit under para (b). This is because the SOC has pleaded two causes of action — please see Mokhtar Sidin JCA's judgment in the Court of Appeal case of *Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417 at p 428.

[31] There is no basis for the defendants to strike out this action pursuant to O 18 r 19(1)(c) of the RC (para (c)) because there is no evidence that a fair trial of this case will be prejudiced, embarrassed or delayed.

F. WHETHER PLAINTIFF IS ESTOPPED FROM FILING THIS SUIT

[32] The defendants had contended that this action should be struck out because equitable estoppel doctrine would bar the plaintiff from filing this action. The defendants had relied on the Federal Court's judgment in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283.

[33] I am of the view that a suit cannot be struck out under any one of the paragraphs in O 18 r 19(1) of the RC by mere reliance on the operation of the equitable estoppel doctrine. This decision is based on the following reasons:

(a) even if it is assumed that a party is estopped from enforcing a cause of action, this does not mean that:

(i) the suit does not disclose a cause of action within the meaning of para (a);

(ii) the action is scandalous, frivolous or vexatious under para (b);

(iii) a fair trial of the action may be prejudiced, embarrassed or delayed in a manner which attracts the application of para (c); and

(iv) the suit constitutes an abuse of court process pursuant to O 18 r 19(1)(d) (para (d)) and/or O 92 r 4 of the RC as well as the court's inherent jurisdiction; and

(b) whether a party is estopped or not from enforcing a cause of action is an issue which should be tried — *Abdul Rahim* at pp 427–428. In other words, the fact that a defendant relies on the operation of equitable estoppel doctrine, does not make it a plain and obvious case for the defendant to strike out a suit — please see Mohd Dzaiddin SCJ's (as he then was) judgment in the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 at p 43.

[34] It is to be noted that *Boustead Trading* does not concern a striking out application.

G. WHETHER THE PLAINTIFF IS BARRED BY ISSUE ESTOPPEL FROM FILING THIS SUIT

[35] The plaintiff submits that this action is not barred by the issue estoppel principle for the following reasons:

(a) the first suit had been filed against the third party and Mr Goh. Hence, the first suit concerned parties who were different from this case;

(b) in this case, the plaintiff has relied on a new cause of action (unjust enrichment) which has not been raised in the first suit; and

(c) the plaintiff is entitled to sue any defendant as the plaintiff pleases provided that the plaintiff is able to prove its claim and does not obtain double recovery of damages.

[36] In opposing encl 5, the plaintiff cited, among others, the following cases:

(a) Peh Swee Chin FCJ's judgment in the Supreme Court case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189;

(b) the judgment of the Court of Appeal delivered by Mary Lim JCA in *Wawasan Dengkil Properties Sdn Bhd & Ors v Khoo Peng Lai & Ors* [2016] 6 MLJ 330;

(c) the decision of the Privy Council delivered by Lord Templeman in an

appeal from Hong Kong, *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839; and

(d) Nallini Pathmanathan JC's (as she then was) judgment in the High Court case of *Tekital Sdn Bhd v Sarina bt Kamaludin & Ors* [2012] 8 MLJ 734.

[37] In *Asia Commercial Finance*, at pp 197–198 and 199–200, it has been explained that the doctrine of res judicata consists of two limbs, namely cause of action estoppel and issue estoppel.

[38] The following decisions of our apex courts have given a wide application of the issue estoppel principle, the second limb of res judicata doctrine:

(a) in the Supreme Court case of *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494; [1986] CLJ Rep 256 ('Sim Kie Chon'), Eusoffe Abdoolcader SCJ decided as follows:

> *The earlier action instituted by the respondent on 2 July 1985 and which was struck out sought relief on the ground of discrimination in breach of* Article 8 *of the Constitution but in the present proceedings the grounds for relief have been augmented and declarations sought to the effect we have indicated earlier. The appellants plead res judicata in this regard and we think the point is well taken and is supported by authority, and we would refer to the pronouncement of the Privy Council in Hoystead & Ors v Commissioner of Taxation* [1926] AC 155 at pp 165–166 *and a catenation of cases to the like effect, namely, that the plea of res judicata applies, except perhaps where special circumstances may conceivably arise of sufficient merit to exclude its operation, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.* (Emphasis added.)

(b) it was decided as follows in *Asia Commercial Finance* at pp 199–200:

> *... the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties ...*
>
> *There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the*

doctrine of res judicata, ie doctrine of estoppel per rem judicatum.

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel per rem judicatum. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation. (Emphasis added.); and

(c) in *Government of India v Petrocon India Ltd* [2016] 3 MLJ 435, at para 53 (*Petrocon India*), Arifin Zakaria CJ delivered the following judgment of the Federal Court:

[53] *It is settled law that for issue estoppel to operate against a party the decision on an issue must have been a 'necessary step' to the decision or 'a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision'* (see *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)*, *Rayner and Keeler Ltd v Courts* [1967] 1 AC 853 at p 965). *To put it simply, the issue in question must have been litigated between the parties and the issue was material to the decision of the court.* (Emphasis added.)

[39] *Sim Kie Chon* and *Asia Commercial Finance (M) Bhd* have decided that the issue estoppel principle has a wide application which *may* bar any:

(a) party; and

(b) party's '*privy*'

— from raising any issue in any second and subsequent proceedings which:

(i) has been raised; or

(ii) *can* be raised with '*reasonable diligence*';

— in the first proceedings between the parties and/or their privies.

[40] According to the issue estoppel principle, if there is a decision in the first litigation between parties 'A' and 'B', the issue estoppel principle *may* bar:

(a) A;

(b) B; and

(c) all the privies of A and B

— from raising any issue which:

(i) has been raised; or

(ii) can be raised be raised with reasonable diligence

— in the first litigation from being raised in the second and subsequent proceedings.

[41] In *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 at p 514, Megarry VC decided in the English High Court that a party 'C' may be a privy of A or B by way of:

(a) blood relationship between C (on the one part) with A or B (on the other part);

(b) title assumed by C from A or B; or

(c) interest between:

(i) C (on the one part); and

(ii) A or B (on the other part).

[42] In *Iradar Sdn Bhd v Nutech Company Limited & Anor* [2016] MLJU 1248; [2017] 1 MLRH 15, at paras 1(2), 2 and 18:

(a) there was a previous suit regarding a patent which had been tried and decided by Azizah Nawawi J ('earlier suit');

(b) a subsequent suit was filed in *Iradar* to invalidate the same patent ('the second suit');

(c) despite the fact that the plaintiffs in the earlier suit ('the plaintiffs (earlier suit)') were different from the plaintiff in *Iradar* ('the plaintiff (second suit)'), I decided that there was a 'privity of commercial interest' between the plaintiffs (earlier suit) and the plaintiff (second suit). Accordingly, I struck out the suit in *Iradar* based on the application of the issue estoppel principle, namely the plaintiff (second suit) as the privy for the plaintiffs (earlier suit) was estopped from filing the second suit regarding the same issue concerning the same patent; and

(d) the above decision has been affirmed by the Court of Appeal.

[43] I am of the view that the plaintiff is barred by the issue estoppel principle from commencing this action against the defendants. This decision is premised on the following evidence and reasons:

(a) there is a 'privity of commercial interest' between the third party and the defendants (please see *Iradar*) which is evidenced by the following:

(i) the defendants had accepted the third party's proposal and the third party's system had been installed at the plant; and

(ii) the first and second indemnities had been given by the third party to the defendants regarding the installation of the third party's system at the plant;

(b) the issue of tort of breach of confidence regarding the confidential information raised in this case, is the same question which has been decided in the first suit (please see *Petrocon India*);

(c) this case concerns the same material facts regarding the confidential information as in the first suit;

(d) based on *Sim Kie Chon*, with reasonable diligence, the plaintiff could have cited the defendants in the first suit and raised the two causes of action against the defendants therein. In fact, by way of theplaintiff's legal demand on 19 October 2010, the plaintiff's solicitors had demanded for the defendants to furnish an undertaking to cease construction of the plant which had used the confidential information. In view of the plaintiff's legal demand, the plaintiff could not claim that there was an oversight in not suing the defendants in the first suit. Furthermore, the defendant's previous solicitors had sent a letter dated 1 November 2010 which had rejected the plaintiff's legal demand; and

(e) the two limbs of res judicata doctrine are not mandatory statutory provisions intended by Parliament to be applicable in all circumstances — please see *Iradar*, at para 19. Res judicata doctrine is based on case law and should not be applied indiscriminately so as to cause an injustice — please see Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 at pp 356–358.

This court decides that it is just and equitable to apply the issue estoppel principle to bar the plaintiff from filing this suit because:

(i) the plaintiff had obtained the judgment which provided for, among others, an inquiry of damages (to be paid by the third party to the plaintiff) and an account of profits (to be paid by the third party and Mr Goh to the plaintiff). There is no evidence that the third party and Mr Goh are insolvent and cannot satisfy the judgment.

On the contrary, the third party has given the first and second indemnities to the defendants. Accordingly, even if this action is struck out, there is no prejudice to the plaintiff because the plaintiff has the right to enforce the judgment against the third party and Mr Goh; and

(ii) if this suit is allowed to proceed and assuming the court decides this action in favour of the plaintiff, the plaintiff is not entitled to have double recovery against the third party (by

virtue of the judgment) and the defendants — please see *Tekital*, at para 114. In other words, in view of the judgment, the plaintiff has no monetary benefit in pursuing this suit against the defendants.

[44] I am of the following view regarding the cases cited by the plaintiff:

(a) cause of action estoppel principle (not issue estoppel principle) was applied in *Asia Commercial Finance (M) Bhd*;

(b) in *Wawasan Dengkil Properties*, at paras 35–37, the issue estoppel principle could not bar a suit to set aside an amended High Court order given in an oppression petition under the then s 181 of the Companies Act 1965 because, among others, the issues in those two proceedings were different;

(c) in *Tekital*, at paras 113–115, the cause of action and parties in the two suits were different. Furthermore, there was no privity between the parties in the two proceedings in question; and

(d) *China and South Sea Bank* did not concern the application of issue estoppel principle.

H. IS THE PLAINTIFF'S CAUSE OF ACTION FOR TORT OF BREACH OF CONFIDENCE TIME-BARRED?

[45] Subparagraph 15.1 of the defence filed in this case, had pleaded that this suit is time-barred under s 6 of the LA. As such, the defendants have complied with s 4 of the LA — please see the Federal Court's judgment delivered by James Foong FCJ in *Tasja Sdn Bhd v Golden Approach Sdn Bhd* [2011] MLJU 067; [2011] 3 CLJ 751, at paras 26–28.

[46] The relevant part of s 6 of the LA provides as follows:

> *6 Limitation of actions of* contract and *tort and certain other actions.*
>
> (1) *Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say*:
>
> (a) *actions founded* on a contract or *on tort*;
>
> ...
>
> (6) *Subject to the provisions of sections 22 and 32 of this Act the provisions of this section shall apply (if necessary by analogy) to all claims* for specific performance of a contract or for an injunction or *for other equitable relief whether the same be founded upon any* contract or tort or upon any trust or *other ground in equity*. (Emphasis added.)

[47] The plaintiff contended that its cause of action for the tort of breach of confidence only accrued when the defendants enjoyed the benefit of the

confidential information. The defendants enjoyed the benefit of the confidential information when the plant was commissioned on 19 August 2011. Accordingly, the six year limitation period for the plaintiff's cause of action for the tort of breach of confidence only expired on 20 August 2017. As this suit was filed on 27 December 2016, the plaintiff's cause of action for the tort of breach of confidence was not time-barred under s 6(1)(a) of the LA.

[48] In *Dynacast (Melaka) Sdn Bhd & Ors v Vision Cast Sdn Bhd & Anor* [2016] 3 MLJ 417; [2016] 6 CLJ 176, at para 31, Richard Malanjum CJ (Sabah and Sarawak) in the Federal Court followed Megarry J's (as he then was) decision in the English High Court case of *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at pp 46–47, that the tort of breach of confidence has the following three elements (*three elements (tort of breach of confidence)*):

(a) the information in question must have the necessary quality of confidence;

(b) the information must have been imparted in circumstances importing an obligation of confidence; and

(c) there must be an unauthorised use of the confidential information to the detriment of the party communicating it ('unauthorised use').

[49] Firstly, it is clear from *Dynacast* that the *three elements (tort of breach of confidence)* do not include any benefit which can or will be enjoyed from the unauthorised use ('benefit from unauthorised use'). I am not able to accept the plaintiff's submission that the cause of action for the tort of breach of confidence only accrues when a defendant enjoys the benefit from unauthorised use. This decision is premised on the following reasons:

(a) the plaintiff's contention regarding benefit from unauthorised use is clearly contrary to trite case law, such as *Dynacast*, which has clearly laid down the *three elements (tort of breach of confidence)*;

(b) the acceptance of the plaintiff's submission regarding benefit from unauthorised use, may cause an injustice as follows:

(i) a plaintiff cannot file a suit and apply for an interlocutory injunction to restrain the unauthorised use until there is evidence of benefit from unauthorised use. The benefit from unauthorised use may take some time to materialise and in such an event, the plaintiff cannot take legal action and may have suffered irreparable harm; *and/or*

(ii) there may be cases where there is unauthorised use but there may not be any benefit from unauthorised use. If the plaintiff's contention is accepted, this means that there cannot be any remedy for the unauthorised use in such cases; and

(c) it has been explained by Hashim Yeop A Sani CJ (Malaya) in the Supreme Court case of *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 at pp 413–414, that a limitation defence is based on a public policy consideration (to ensure a finality in litigation). To achieve such a public policy consideration, the limitation period should commence from the earliest time when a cause of action accrues. I cite Shaik Daud JCA's judgment in the Court of Appeal in *Nik Che Kok @ Nik Soo Kok v Public Bank Bhd* [2001] 2 MLJ 328 at p 331, as follows:

> *It is our view that for the purpose of limitation, time began to run from the earliest time at which the creditor could have brought an action*. (Emphasis added.)

If a cause of action for the tort of breach of confidence only accrues after there is benefit from unauthorised use (as contended by the plaintiff), this will mean a plaintiff has more time to file a suit and this in turn will defeat the above public policy consideration underpinning a limitation defence (to ensure a finality in litigation).

[50] My research has not revealed any previous Malaysian case which has decided when a cause of action for the tort of breach of confidence accrues. I am of the view that a cause of action for the tort of breach of confidence accrues on a date when the *three elements (tort of breach of confidence)* are satisfied and:

(a) a plaintiff is entitled to commence an action for such a tort on that date; and

(b) the six-year limitation period for the purpose of s 6(1)(a) of the LA will commence to run from that date.

The above decision is based on the following judgments of our apex courts:

(i) it was decided in *Credit Corporation (M)* at p 411:

> *From established authorities we can now accept that the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.* (Emphasis added.); and

(ii) Jeffrey Tan FCJ decided as follows in the Federal Court case of *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749 at paras 12 and 14:

> [12] *In Letang v Cooper* [1965] 1 QB 232, at pp 242–243, *Lord Diplock defined a 'cause of action' as 'a factual situation the existence of which entitled one person to obtain from the court a remedy against another', which definition was adopted in Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230, where Abdul Hamid Ag LP, as he then was, appended that 'there must be a cause of action before a plaintiff can claim a relief in an action'. *In Government of Malaysia v Lim Kit Siang United Engineers (M) Berhad v Lim Kit Siang* [1988]

> 2 MLJ 12 at p 19*, the Supreme Court per Salleh Abbas CJ, expounded that to make up 'a cause of action', first, the plaintiff has a right at law or by statue and secondly, the right has been affected by the act of the defendant*: ...
>
> ...
>
> [14] *Other authorities, inter alia, Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661, *Mohamed Yusop bin Abdul Wahab v American Express (M) Sdn Bhd* [2002] 6 MLJ 507, *Goh Joon v Kerajaan Negeri Johor & Ors* [1998] 7 MLJ 621*, applied the following definition found in Stroud's Judicial Dictionary (5th Ed) at p 378: A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Esher MR, Read v Brown* (1888) 22 QBD 128*; this case was applied in Bennett v White* [1910] 2 KB 643). (Emphasis added.)

[51] Based on the above reasons, the *three elements (tort of breach of confidence)* are satisfied on 30 April 2010 when the defendants used the confidential information by examining, making, retaining and providing copies of drawings of the third party's proposal to other parties (to construct the plant). As such, the six year limitation period for the plaintiff's cause of action for the tort of breach of confidence would have expired on 1 May 2016. When this suit was filed on 27 December 2016, the plaintiff's cause of action for the tort of breach of confidence was time-barred under s 6(1)(a) of the LA.

It is to be noted that the plaintiff's legal demand on 19 October 2010 (for the defendants to give an undertaking to cease construction of the plant based on confidential information) had been sent *before* the plant was commissioned on 19 August 2011. If the plaintiff had truly believed that its cause of action for the tort of breach of confidence only accrued when the defendants enjoyed the benefit of the confidential information on 19 August 2011, the plaintiff's legal demand would not have been sent.

[52] Additionally or alternatively, the defendants first received and enjoyed the benefit of the confidential information on 30 April 2010 (when the defendants had first used the confidential information in the construction of the plant). As held in *Nik Che Kok*, limitation period commences at the earliest time when a plaintiff can commence a suit. Accordingly, even if I have accepted the plaintiff's submission that the plaintiff's cause of action for the tort of breach of confidence had only accrued on the date when the defendants had received the benefit from unauthorised use, this action based on the tort of breach of confidence would still have been time-barred under s 6(1)(a) of the LA.

I. HAS LIMITATION SET IN FOR THE PLAINTIFF'S UNJUST ENRICHMENT CLAIM?

[53] The plaintiff submitted that the defendants had been unjustly enriched on 19 August 2011 when the plant had been commissioned. The plaintiff relied on the opinion of Mr Low Weng Tchung in *The Law of Restitution and Unjust Enrichment in Malaysia (2015)*, at para 12.16 at p 790, as follows:

> *The better view is that a claim for restitution accrues at the date when the enrichment is received or the date the ground of restitution is established, whichever is the later.* (Emphasis added.)

Mr Low's above opinion is based on the view of Mr Andrew Burrows, *The Law of Restitution* (3rd Ed, 2011), at p 608.

[54] I cannot find any previous Malaysian case which has decided when a cause of action for unjust enrichment accrues for the purpose of deciding whether limitation has set in or not. Nor is there any Malaysian judgment which has decided whether s 6 of the LA (be it sub-s (1) or (6)) applies or not to a cause of action for unjust enrichment.

[55] In *United Logistics Sdn Bhd v Stamford College (PJ) Sdn Bhd* [2016] MLJU 392; [2016] MRLHU 782, at paras 56–58 and 61, I have decided that there are two bases for an unjust enrichment claim in Malaysia as follows:

(a) s 71 of the Contracts Act 1950 ('the CA'); and

(b) Azahar Mohamed FCJ's judgment in the Federal Court case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441.

The decision in *United Logistics* has been affirmed by the Court of Appeal.

[56] Section 71 of the CA provides as follows:

> *71 Obligation of person enjoying benefit of non-gratuitous act*
>
> *Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.* (Emphasis added.)

[57] In an appeal from Malaysia, Lord Upjohn held as follows in the Privy Council case of *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118 at p 120:

> *It has been common ground before their Lordships that four conditions must be satisfied to establish a claim under* s 71.
>
> *The doing of the act or the delivery of the thing referred to in the section:*

A (1) *must be lawful;*

(2) *must be done for another person;*

(3) *must not be intended to be done gratuitously; and*

B (4) *must be such that the other person enjoys the benefit of the act or the delivery*. (Emphasis added.)

[58] In this case, the plaintiff's SOC pleaded that the defendants had been unjustly enriched by the commission of a tort of breach of confidence. C Accordingly, the first condition for the application of s 71 of the CA (the act or thing in question must be lawful) cannot be fulfilled in this case. It is thus clear that the plaintiff's SOC is not relying on s 71 of the CA.

[59] It has been decided as follows in *Dream Property*, at paras 110 and D 117–118:

110. *Restitution simply means that a party who has received a benefit must restore the benefit received by him. The theoretical foundation of the right to restitution remedy as it is understood today is that it is founded on the law of unjust enrichment which fall outside the domains of contract and tort. The law of contract/tort and the law of unjust* E *enrichment are conceptually distinct. Unjust enrichment describes a cause of action. On the other hand restitution describes a remedy. Restitution as a response to wrongdoing is therefore a different topic from restitution as a response to unjust enrichment* (see Goff & Jones on *The Law of Unjust Enrichment* para 1–04). *The courts have found it necessary to make available, independent of the law of contract and civil wrongs, for the* F *restoration of benefits on the grounds of unjust enrichment*.

...

117. *The above passages from the judgments of the House of Lords are instructive and are significant contribution to the development of law of unjust enrichment. The principle underlying the cases of Banque Financiere de la Cite v Parc (Battersea) Ltd* and *Sempra* G *Metals Ltd (formerly Metallgesellschaft Ltd) v IRC is that, in the context of the present case, a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that:*

(a) *the plaintiff must have been enriched;*

H (b) *the enrichment must be gained at the defendant's expense;*

(c) *that the retention of the benefit by the plaintiff was unjust; and*

(d) *there must be no defence available to extinguish or reduce the plaintiff's liability to make restitution.*

I 118. *Nearer home, there is now no longer any question that unjust enrichment law is a new developing area of law which is recognised by our courts. That the principle of unjust enrichment is the basis to justify an award of restitutionary relief can be seen in Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 220 *and in Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59. Nevertheless, it has to be said that despite the increase in judicial reference to the expression of unjust

enrichment to justify an award of restitutionary reliefs, the law of unjust enrichment is still in its formative stage in our jurisdiction (see article entitled 'An Introduction to the Law of Unjust Enrichment' [2013] 5 MLJ i by Alvin WL See). *In our view, the time has come for this court to recognise the law of unjust enrichment by which justice is done in a range factual circumstances, and that the restitutionary remedy is at all times so applied to attain justice.* (Emphasis added.)

[60] I am of the following view regarding when a cause of action for unjust enrichment accrues:

(a) a claim for unjust enrichment is a claim for '*equitable relief*' within the meaning of s 6(6) of the LA. Accordingly, by reason of s 6(6) of the LA, the six-year limitation period in s 6(1) of the LA applies to a cause of action for unjust enrichment; and

(b) a cause of action for unjust enrichment accrues when a defendant has *retained* the benefit in question — please see the third element for an unjust enrichment claim as laid down in *Dream Property*.

The Limitation Act 1980 of the United Kingdom ('the LA 1980 (UK)') is materially different from our s 6(6) of the LA. Having said that, the following English High Court decisions have held that a cause of action for unjust enrichment accrues when a defendant has retained the benefit in question:

(i) Lightman J's judgment in *Fuller v Harry Shopper Markets Ltd & Anor* [2001] 1 WLR 1681 at para 13; and

(ii) in *Diamandis v Wills and another* [2015] EWHC 312, Stephen Morris QC (sitting as a Deputy High Court judge) (as he then was) decided as follows:

> ... First, whilst the point is not entirely free from doubt and whilst I accept that the case of *Phillips v Bath Housing* may be distinguishable as suggested by the claimant, *the balance of authority (both judicial and academic) is that common law claims in unjust enrichment (including the present claim for restitutionary quantum meruit/free acceptance) are generally statute barred after six years under* s 5 of the LA 1980 (UK): *Goff and Jones* at pp 33–06 to 33–08; *Burrows: Restatement of the English Law of Unjust Enrichment p 30(2) and Metcalfe v Dennison TCC HH Judge Raynor QC 6 December 2013 at pp 28–30. As to the date of accrual of the cause of action in restitution, this is normally the date when the defendant receives the benefit*. ... (Emphasis added.)

Despite the differences in wording between our s 6(6) of the LA and LA 1980 (UK), I accept the above English cases regarding when a cause of action for unjust enrichment accrues. This is because our Federal Court in *Dream Property* has followed English cases in

recognising a new cause of action in unjust enrichment.

In view of the above reasons, with respect, I am unable to accept Mr Low's opinion regarding the accrual of a cause of action for unjust enrichment. Furthermore, as decided in *Nik Che Kok*, limitation period commences at the earliest time when a plaintiff can commence a suit, namely when a defendant has retained a benefit which is the subject matter of an unjust enrichment claim.

[61] In this case, s 6(6) of the LA is subject to ss 22 and 32 of the LA. It is clear that neither s 22 of the LA (limitation of actions in respect of trust property) nor s 32 of the LA (nothing in LA shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, *laches* or otherwise) applies in this case.

[62] I decide that the defendants had retained the benefit of the confidential information on 30 April 2010 (when the defendants had first used the confidential information in the construction of the plant). In accordance with *Nik Che Kok* (limitation period commences at the earliest time when a plaintiff can commence a suit), limitation period for the plaintiff's cause of action for unjust enrichment accrued on 30 April 2010 and would be time-barred on 1 May 2016. Consequently, this suit based on a claim for unjust enrichment (filed on 27 December 2016) was time-barred under s 6(6) of the LA.

J. WHETHER THE COURT SHOULD STRIKE OUT THIS ACTION

[63] As this suit is barred by issue estoppel principle (please see Part G) and limitation (please refer to Parts H and I):

(a) this action:

(i) is frivolous *and/or* vexatious pursuant to para (b); *and/or*

(ii) constitutes an abuse of court process under para (d), O 92 r 4 of the RC and/or the court's inherent jurisdiction;

(b) the court has a discretionary power under O 18 r 19(1) of the RC to amend the SOC (instead of striking out a SOC) (please see Mahadev Shankar JCA's judgment in the Court of Appeal case of *Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara Maju Bhd* [1997] 1 MLJ 557 at pp 560–561). Having considered the application of issue estoppel principle and the defence of limitation in this case, this suit cannot be '*saved*' by any amendment to the SOC; and

(c) it is plain and obvious that this action should be struck out on the ground that it is obviously unsustainable — *Bandar Builder*.

K. CAN THE THIRD PARTY STRIKE OUT THIS SUIT?

[64] Firstly, upon the striking out of this action, the third party notice will also be consequently set aside — please see *MMIP Services Sdn Bhd (as administrator of Malaysian Motor Insurance Pool) v Overseas Assurance Corp (M) Bhd (the successor in title to the general insurance business of Tahan Insurance (M) Bhd pursuant to vesting order dated 15 October 2010) (IUB Greengold Bhd, third party (formerly known as Tahan Insurance Malaysia Bhd))* [2016] 10 MLJ 452; [2016] 3 AMR 143 at para 39. The decision in *MMIP Services* has been affirmed by the Court of Appeal.

[65] Order 16 rr 4(3), (4), (5), 6 and O 18 r 19(1) of the RC provide as follows:

> O 16 r 4(3) *On an application for directions under this rule, the Court may*:
>
> (a) if the liability of the third party to the defendant who issued the third party notice is established on the hearing, order such judgment as the nature of the case may require to be entered against the third party in favour of the defendant;
>
> (b) order any claim, question or issue stated in the third party notice to be tried in such manner as the Court may direct; or
>
> (c) dismiss the application and terminate the proceedings on the third party notice,
>
> and may do so either before or after any judgment in the action has been signed by the plaintiff against the defendant.
>
> Rule 4(4) *On an application for directions under this rule, the Court may* give the third party leave to defend the action, either alone or jointly with any defendant, upon such terms as may be just, or to appear at the trial and to take such part therein as may be just, and *generally may make such orders and give such directions as appear to the Court proper for having the rights and liabilities of the parties most conveniently determined and enforced and as to the extent to which the third party is to be bound by any judgment or decision in the action*.
>
> Rule 4(5) *Any order made or direction given under this rule* shall be in Form 23 and *may be varied or rescinded by the Court at any time*.
>
> Rule 6 *Proceedings on a third party notice may, at any stage of the proceedings, be set aside by the Court*.
>
> O 18 r 19(1) *The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that* ... (Emphasis added.)

[66] I cannot find any previous Malaysian case which has decided on whether a third party may apply to court to strike out an action or otherwise. I am of the view that a third party cannot apply to court under RC to strike out a suit or a counterclaim. This decision is premised on the following reasons:

(a) a third party may apply to court under O 16 r 6 of the RC to set aside a third party notice — *MMIP Services* at para 46. Order 16 r 6 of the RC does not however allow a third party to apply to court to strike out an action by a plaintiff or a defendant's counterclaim;

(b) O 18 r 19(1) of the RC applies to a striking out application by a plaintiff or a defendant regarding the main suit. O 18 r 19(1) of the RC also allows a third party to apply to court to strike out a third party notice — *MMIP Services* at paras 46–48. There is however nothing in O 18 r 19(1) of the RC, either expressly or by necessary implication, which permits a third party to apply to court to strike out a suit or a counterclaim;

(c) if the rules committee had intended for RC to provide for a third party to apply to court to strike out a suit or a counterclaim, the rules committee would have expressly provided for such an avenue in O 16 r 6 or O 18 r 19(1) of the RC. The rules committee however did not do so. This is understandable because the striking out of a suit or a counterclaim, is a draconian measure which will deprive a plaintiff (regarding a suit) or a defendant (concerning a counterclaim) of his or her fundamental right under art 5(1) of the Federal Constitution to have access to justice — please see Gopal Sri Ram FCJ's judgment in the Federal Court case of *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333 at pp 341–342; [2010] 3 CLJ 507 at pp 514–515. Moreover, a plaintiff may not have any dispute with a third party which can justify an application by a third party to strike out an action;

(d) O 16 r 4(3) and (4) of the RC, either expressly or by necessary implication, do not provide that a third party can apply to court to strike out a suit or a counterclaim. Furthermore, any direction or order issued by the court under O 16 r 4 of the RC '*may be varied or rescinded by the court at any time*' according to O 16 r 4(5) of the RC. It is clear that by virtue of O 16 r 4(5) of the RC, all directions and orders issued by the court pursuant to O 16 r 4 of the RC, are tentative and can be re-visited by the court at any time (before a final decision of the court); and

(e) the court should not exercise its inherent jurisdiction or inherent powers under O 92 r 4 of the RC to allow a third party to strike out a suit or a counterclaim. This is firstly due to the reasons expressed in the above sub-para (3). In any event, the court's inherent jurisdiction should not be invoked to allow a third party to strike out a suit or a counterclaim because:

(i) there is no injustice to a third party if the third party cannot strike out an action or counterclaim. On the contrary, there will be an injustice to a plaintiff or a defendant if the court allows a third party to strike out a suit or a counterclaim; *and/or*

(ii) there is no abuse of court process if a third party is disallowed from

striking out a suit or a counterclaim. This is because an action or a counterclaim does not necessarily affect a third party adversely.

[67] Premised on the above reasons, I am constrained to dismiss encl 20 with costs.

L. SUMMARY OF COURT'S DECISION

[68] Enclosure 5 is allowed with costs (to be paid by the plaintiff to the defendants) because this action is barred by:

(a) issue estoppel principle; *and/or*

(b) limitation.

Accordingly, this suit:

(i) is frivolous and/or vexatious within the meaning of para (b); *and/or*

(ii) constitutes an abuse of court process under para (d), O 92 r 4 of the RC and/or the court's inherent jurisdiction.

[69] Enclosure 20 is dismissed with costs (to be paid by third party to plaintiff) because the third party cannot apply to strike out this action pursuant to O 16 rr 4(3), (4), 6, O 18 r 19(1) and O 92 r 4 of the RC and/or the court's inherent jurisdiction.

Enclosure 5 allowed with costs; encl 20 dismissed.

Reported by Afiq Mohamad Noor